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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

BOARD OF REGENTS OF THE
UNIVERSITY OF NEW MEXICO,
Petitioner,

v.

JOANNE MIGNEAULT,
Respondent.

and UNITED STATES OF AMERICA,
Intervenor Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are claims brought by private persons in federal court against State entities pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, barred by the Eleventh Amendment to the United States Constitution?

LIST OF PARTIES

Petitioners

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO.

Respondents

JOANNE MIGNEAULT and UNITED STATES OF AMERICA.

Amicus Curiae

AMERICAN ASSOCIATION OF RETIRED PERSON.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Board of Regents of the University of New Mexico (hereinafter referred to as the University) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit Court in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, App. 1a - 19a, is reported at 158 F.3d 1131 (10th Cir. 1998). The opinion of the United States District Court for the District of New Mexico, App. 20a to 46a, is reported at 973 F.Supp. 1295 (D.N.M. 1997).

JURISDICTION

The judgment of the Court of Appeals was entered on October 23, 1998. No rehearing was sought. The Court of Appeals stayed the mandate pending the filing of this petition for writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides:

> Section 1 . . . [N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5 . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The relevant provisions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*, are reproduced in the Appendix. App. 47a to 51a.

STATEMENT OF THE CASE

This appeal challenges the decisions of the United States District Court for the District of New Mexico and the Tenth Circuit Court of Appeals finding that the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (hereinafter the ADEA), was enacted pursuant to the Fourteenth Amendment to the United States Constitution. Congress may validly abrogate the states' Eleventh Amendment immunity in enactments under the Fourteenth Amendment while, under the Commerce Clause, it lacks the authority to abrogate such immunity. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

The relevant facts are not disputed for purposes of this petition and as presented to the Tenth Circuit. Respondent was an employee of the University of New Mexico, a branch of the State from March, 1982 through December, 1994, when she was laid off after her position was eliminated due to financial shortfalls. Migneault v. Peck, 158 F.3d at 1134, 973 F.Supp. at 1299, App. 3a and 21a. Respondent was over 40 years of age at all relevant times. *Id.*

Respondent applied but was not hired for a position as Executive Secretary to the Vice President for Health Sciences, Dr. Jane Henney. App. 4a and 22a. In her complaint, respondent alleged, *inter alia*,[1] that Dr. Henney's reasons for not selecting respondent for the position were a pretext for discrimination on the basis of respondent's age. Both the District Court and the Court of Appeals found sufficient evidence of pretext to defeat the University's entitlement to summary judgment in the facts alleged by responses that the individual selected was the only one of four final candidates for the position who was not over forty years of age, and the stated reasons that respondent was overqualified since the position was two pay grades lower than the position from which she was laid off and the perception that respondent would not be happy with a secretary position when she had been a highly compensated administrative assistant. *Id.* 158 F.3d at 1134, 973 F.Supp. at 1299, App. 4a and 22a.

The district court granted in part and denied in part

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[1] The remaining claims in the complaint are not at issue in this petition. The additional issue presented to the Tenth Circuit, whether Dr. Henney was entitled to qualified immunity for age-based discrimination alleged against her personally, is not at issue in this petition.

petitioners' motions to dismiss and for summary judgment as to the various claims in the complaint. 158 F.3d at 1134, 973 F.Supp. at 1295, App. 3a and 20a. In addition to asserting that other claims in the complaint should be dismissed or summary judgment granted to the University defendants,[2] the University argued that the ADEA claims against the state university by a private person were barred by the Eleventh Amendment.

Ruling on these motions, the district court dismissed all claims except the ADEA claim against the University of New Mexico and a Fourteenth Amendment claim against Defendant Henney which alleged that Dr. Henney had personally discriminated against respondent on the basis of age. *Id.* With regard to the ADEA claim against the University, the District Court held that it was bound by Hurd v. Pittsburgh State Univ., 109 F.3d 1540 (10th Cir. 1997), ("Hurd II"), the prevailing authority in the Tenth Circuit, which had held, after Seminole, that Congress validly enacted the ADEA under the Fourteenth Amendment. With regard to the claims against Dr. Henney, the District Court determined that, because the ADEA was enacted under the Fourteenth Amendment, Dr. Henney could be held personally liable under the Fourteenth Amendment as well.

The University and Dr. Henney appealed the district court's ruling as to the ADEA claim against the University and

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[2] The University defendants included several high level administrators, including the President and the Vice President for Business and Finance, the Vice President for Health Sciences, the Dean of the School of Medicine, the Director of Human Resources and the individually named members of the Board of Regents. Claims against all but the Board of Regents of the University itself and Dr. Henney, the Vice President for Health Sciences, have been dismissed. The Tenth Circuit ruled that Dr. Henney was entitled to qualified immunity and she is not a party to this petition.

the Fourteenth Amendment claim against Dr. Henney. The Tenth Circuit affirmed its earlier ruling in Hurd II, holding that the ADEA was validly enacted under the Fourteenth Amendment.[3] The Circuit Court, however, agreed that the claims against Defendant Henney in her personal capacity under the Fourteenth Amendment should be dismissed because the ADEA is the exclusive remedy for claims of age-based discrimination and age discrimination claims under § 1983 are therefore pre-empted. As a consequence, the Circuit Court ruled that no separate claim against the individual defendant under § 1983 was cognizable and Dr. Henney was entitled to qualified immunity, dismissing claims against her personally. Dismissal of the claims against Dr. Henney is not at issue in this petition.

The University argued, on the basis of this Court's decision in Seminole which was addressed in the Hurd II case, and City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157 (1997), which had not been decided when Hurd was at issue, that Congress failed to validly abrogate Eleventh Amendment immunity in enacting the ADEA. In Seminole, this Court held that the Eleventh Amendment prohibits federal courts from asserting jurisdiction over a private suit against a state unless: 1) the State consented to suit[4] or 2) Congress unequivocally and expressly abrogated state sovereign immunity pursuant to a valid exercise of its power under the Fourteenth Amendment. 517 U.S. at 55. The second requirement

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[3] The Court of Appeals found itself unable to address the University's argument concerning the Eleventh Amendment bar to ADEA claims against the State because another panel of the Tenth Circuit had already decided the issue. Migneault, 158 F.3d at 1136, App. p. 8a - 9a; Finley v. United States, 82 F.3d 966 (10th Cir. 1996).

[4] The State of New Mexico has not consented to suit under the ADEA.

articulated in Seminole, mandates that Congress both expressly state its intention that Eleventh Amendment immunity be abrogated and that Congress, in seeking to abrogate, has acted pursuant to a valid grant of authority. *Id.* at 56.

The University argued that, in enacting the ADEA and its 1974 amendments, Congress had not unequivocally expressed its intent to abrogate states' Eleventh Amendment immunity. When it was originally enacted in 1967, the ADEA was not applied to the states, but was enacted based on Congress' belief that "the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of commerce." 29 U.S.C. § 621(a).

When Congress amended the ADEA and FLSA to also extend to state employers, there was no statement in the legislative history reflecting Congressional intent that the amendments be enacted pursuant to the Fourteenth Amendment. Instead, the only relevant comments in the legislative history reflect Congress' ongoing assumption that the ADEA, like the FLSA, was premised on the Commerce Clause. Congress' silence presumes that Congress did not wish to alter the Commerce Clause basis for the ADEA when that Act was amended. Pennhurst State Sch. and Hospital v. Halderman, 451 U.S. 1, 17-18 (1981); ("Pennhurst I"); BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).

The University also argued to the Tenth Circuit that this Court's precedent confirmed that the ADEA was a Commerce Clause enactment. The majority conclusion of four justices in EEOC v. Wyoming, 460 U.S. 226, 243 (1983) held that the ADEA was a valid exercise of Congress' powers under the Commerce Clause. Although the ultimate

conclusion of EEOC v. Wyoming, that Congress could validly overrule states' immunity under the Commerce Clause, was overruled in Seminole, the Commerce Clause basis for the ADEA was the expressed opinion of the Court and four dissenting justices.

This analysis was confirmed in Gregory v. Ashcroft, 501 U.S. 452, 467-70 (1991), where the Court refused, on the basis of Pennhurst I, to infer a Fourteenth Amendment basis from Congressional silence. Pennhurst I, 451 U.S. at 16. Because of the intrusive nature of Fourteenth Amendment enactments, exercise of Congress' power under that provision should not be lightly inferred.

This Court has recognized the ADEA's Commerce Clause basis in EEOC v. Wyoming, which has remained unaltered by subsequent legislative or Supreme Court action. Coupled with the historic reluctance to infer a Fourteenth Amendment underpinning, the Commerce Clause foundation for the ADEA is manifest. The Tenth Circuit rejected petitioner's arguments, previously addressed and rejected in Hurd, without discussion.

The Tenth Circuit did address, but rejected, the University's argument based on City of Boerne, decided subsequent to the Hurd opinions. Migneault, 158 F.3d at 1136 - 37, App. 15a. In Boerne, this Court built on Seminole and clarified the parameters of the requirement that Congress must have acted pursuant to a valid grant of authority, regardless of its expressed intention to abrogate. The Court found that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would not be, in any meaningful sense, the 'provisions of [the

Fourteenth Amendment]'" City of Boerne, 117 S.Ct. at 2164 (citations omitted).

According to City of Boerne, cases relying on the power of Congress derived from the Fourteenth Amendment have been upheld when remedying "widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." 117 S.Ct. at 2167. Similar power was not recognized when the discrimination asserted was on a basis other than race or other than some other immutable characteristic found entitled to heightened scrutiny review.

Under City of Boerne, Congress' authority to enact the ADEA under the Fourteenth Amendment is in doubt. The ADEA goes far beyond the power granted to Congress under the Fourteenth Amendment with its goal of preventing racial discrimination and alleviating the effects of that discrimination. Age was never a category sought to be given protection during enactment of the Fourteenth Amendment and Congress thus lacked power under that authority to enact the ADEA.

The Tenth Circuit, however, refused to alter its opinion regarding the ADEA subsequent to City of Boerne. The Tenth Circuit Court concluded that the ADEA was within Congress' legislative authority because the Fourteenth Amendment protects against arbitrary age discrimination. Relying on City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), the Tenth Circuit found that the Fourteenth Amendment guarantees that all persons shall be treated alike and that, under Gregory v. Ashcroft, arbitrary age discrimination may violate the Equal Protection Clause. The Tenth Circuit upheld the ADEA as remedial legislation, while conceding that the legislative history "did not provide specific

or detailed evidence of discrimination," Migneault, 158 F.3d at 1138, App. 14a, as mandated in City of Boerne. Instead, the Court relied on "judicial deference" to Congressional enactments and recognized that support for such enactment may not be contained in the record compiled by Congress. *Id.* This conclusion was in direct contravention to the dictates of City of Boerne that the enactment have been to remedy demonstrated acts of discrimination. Without such support, City of Boerne and Seminole deny Congressional authority to abrogate the state's Eleventh Amendment immunity.

The University requests that this Court grant this petition and review the opinion of the Tenth Circuit. The issues presented are substantial and should be addressed by this Court.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER CONGRESS VALIDLY ABROGATED STATES' ELEVENTH AMENDMENT IMMUNITY IN ENACTING THE ADEA.

Since this Court's decisions in Seminole and City of Boerne, the issue addressed by the Tenth circuit in this case has been addressed by nearly every other circuit court. Not only have the conclusions of these courts differed, but the reasoning used by the courts in reaching those conclusions has been even more varied. At least two cases are pending on petitions for writ of certiorari which raise the same issue presented in this petition. Following is a summary of some of the decisions and the reasoning found persuasive by the Courts in those cases:

Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690 , 695 (3rd Cir. 1996): "The ADEA simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants. . . ." and Congress possessed the authority to abrogate state immunity.

Coger v. Board of Regents of Tenn., 154 F.3d 296 (6th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3364 (U.S. Nov. 16, 1998)(No. 98-821): Congress unmistakably indicated its intention to act under the Fourteenth Amendment when it enacted the 1974 amendments to the ADEA to include states in the definition of employers.

Cooper v. New York State Office of Mental Health, ___ F.3d ___, 1998 WL 898290 (2nd Cir. 1998): In amending the ADEA, Congress unequivocally intended to abrogate states' Eleventh Amendment immunity and had the power to do so.

Goshtasby v. Board of Trustees of the Univ. of Ill., 141 F.3d 761 (7th Cir. 1998): Congress unmistakably indicated its intent to abrogate Eleventh Amendment immunity, thus the ADEA abrogates states' immunity. *See also* Debs v. Northeastern Ill. Univ., 153 F.3d 390 (7th Cir. 1998).

Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822 (8th Cir. 1998): The Eighth Circuit concluded both that Congress had not unequivocally expressed its intent that the states' Eleventh Amendment immunity be waived and that Congress had not acted pursuant to a valid exercise of power, as required by Seminole. Congress' intent to abrogate was not unmistakably clear from the language of and amendments to the ADEA.

See also Hall v. Missouri Highway and Trans. Comm'n, 995 F.Supp. 1001 (E.D.Mo. 1998): Congress lacked the power to pass the ADEA because age-based classifications are entitled only to rational basis scrutiny.

Keeton v. University of Nev. Sys., 150 F.3d 1055 (9th Cir. 1983): Congress clearly expressed its intention to abrogate states' Eleventh Amendment immunity when it amended the ADEA in 1974.

Kimel v. Florida Bd., 139 F.3d 1426 (11th Cir. 1998), *petition for cert. filed,* 67 U.S.L.W. 3348 (U.S. Nov. 13, 1998)(No. 98-791): The majority of the Eleventh Circuit panel hearing the case concluded that the State University was immune under the Eleventh Amendment, but the two judges comprising the majority employed differing theories for reaching their conclusion. Judge Edmondson held that Congress had not clearly expressed its intent to abrogate state immunity in enacting the ADEA and its 1974 amendments, while Judge Cox held that the intent to abrogate was clearly expressed but determined that Congress lacked the power under the Fourteenth Amendment to abrogate the immunity.

Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694 (1st Cir. 1993): The ADEA was not enacted under the Commerce Clause. This ruling occurred prior to this Court's decisions in Seminole and City of Boerne.

Scott v. University of Miss., 148 F.3d 493 (5th Cir. 1998): Amendment in 1974 to include states in the definition of employers evidences Congress' clear intention to abrogate immunity.

The split in the Circuits and district courts in both reasoning and results could not be more disparate or

profound. Courts that resolve the issue solely by holding that Congress unequivocally demonstrated an intent to abrogate immunity have failed to address the other, more important issues of whether the enactment was valid under the City of Boerne analysis and, more importantly, whether Congress even had the power to enact the ADEA. This Court should grant review to resolve the conflict and to determine the extent of Congress' power to abrogate. Whether Congress validly abrogated the states' Eleventh Amendment immunity from suit under the ADEA is an issue of significant importance throughout the country.

The need for uniformity of decisions concerning this issue is manifest. The ADEA is Congressional legislation that potentially affects the lives of all Americans, if not now, then in the future. If the question of the validity of the ADEA is not resolved by this Court, no other authority will resolve it. If the issue is not definitively resolved, states will not know if they are to be held accountable in federal court for decisions which may implicate age-based discrimination. Currently, states within two federal circuits are immunized from such intrusions into their sovereignty, while those states in other federal circuits that have failed to accord immunity under the Eleventh Amendment remain subject to suit in federal court.

II. THE INTERPRETATION OF ELEVENTH AMENDMENT IMMUNITY AND CONGRESS' POWER TO ABROGATE THAT IMMUNITY SUBSEQUENT TO SEMINOLE AND CITY OF BOERNE ARE ISSUES OF SIGNIFICANT IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT.

Seminole overruled settled and accepted precedent that had confirmed Congress' power to abrogate Eleventh Amendment immunity under its Commerce Clause power.

The interplay between state and federal sovereignty is of manifest importance. "[T]he need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." Pennhurst State Sch. and Hospital v. Halderman, 465 U.S. at 89 (1984) ("Pennhurst II"). But, with enactment of the Eleventh Amendment, "the intent of the Framers concerning the reach of federal judicial power" was clarified and "the original understanding" that states could not be made unwilling defendants in federal court was restored. Employees of Dept. of Public Health and Welfare v. Missouri Public Health and Welfare Dept., 411 U.S. 279, 291-92 (1973). In enacting the ADEA, Congress upset this delicate balance, justifying this Court's review of that action.

Whether Congress expressed its intention and had the power to abrogate the states' Eleventh Amendment immunity in enacting the ADEA are issues of significant importance.

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

In re State of New York, 256 U.S. 490, 497 (1921). The result of the decision of the Tenth Circuit is to permit federal judicial intervention to enforce Congress' desire to conform actions of the states to Congress' view of what is or what is not appropriate action, in essence making the state an unwilling litigant in federal court. Permitting such intervention contravenes the historic underpinnings of the Eleventh Amendment.

The delicate balance between state and federal power is implicated in Congress' enactment of the ADEA. It is this Court's province to review Congress' action and determine if Congress had the power to act as it did and to address whether Congress appropriately acted.

III. THE COURT SHOULD GRANT THIS PETITION TO CORRECT THE ERRONEOUS DECISION OF THE TENTH CIRCUIT HOLDING THAT CONGRESS VALIDLY ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The Tenth Circuit incorrectly determined, under Seminole and City of Boerne, that Congress intended to and had the power to abrogate Eleventh Amendment immunity and that Congress validly exercised that power in enacting the ADEA. The decision of the Tenth Circuit was incorrect for the following reasons:

1. THE ADEA DOES NOT CONTAIN AN UNEQUIVOCAL TEXTUAL EXPRESSION OF CONGRESSIONAL INTENT TO ABROGATE A STATE'S ELEVENTH AMENDMENT IMMUNITY.

The Tenth Circuit concluded that the ADEA contains an adequate expression of Congressional intent to abrogate a state's Eleventh Amendment immunity. In its decision, the panel relied on a previous panel's opinion in Hurd II, 9 F.3d at 1546, stating that it could not address this claim absent an *en banc* reconsideration or a superseding contrary decision by the Supreme Court. The Hurd II decision was based on an earlier Tenth Circuit Court panels decision in the same case, Hurd v. Pittsburg State Univ., 29 F.3d 564 (10th Cir.), *cert. denied*, 513 U.S. 930 (1994) ("Hurd I"), decided before this Court's decision in Seminole. The Tenth Circuit panel in Hurd I and Hurd II found that by including states in the definition of "employer" and allowing suits in federal court, Congress had sufficiently expressed its intent to abrogate Eleventh Amendment immunity of the states.

But these decisions are contrary to decisions of this Court in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) and Dellmuth v. Muth, 491 U.S. 223 (1989). In Atascadero, the Court held that because the Eleventh Amendment implicates the fundamental constitutional balance between the federal government and the states, the Court requires "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" 473 U.S. at 239-240 (*quoting* Pennhurst II, 465 U.S. at 99 and Quern v. Jordan, 440 U.S. 332, 342 (1979)). Thus, "Congress must express its intention to

abrogate the Eleventh Amendment in *unmistakable language in the statute itself.*" Atascadero, 473 U.S. at 243 (emphasis added). Following its reasoning in Atascadero, the Court held in Dellmuth that "evidence of congressional intent must be both *unequivocal and textual.*" 491 U.S. at 230 (emphasis added).[5]

The ADEA fails the tests set forth in Atascadero and Dellmuth, both of which were decided after enactment in 1974 of an amendment to the ADEA adding states and their instrumentalities and political subdivisions to the definition of "employer" under the ADEA. 29 U.S.C. Section 630(b). The ADEA itself contains no statement of intent to abrogate the Eleventh Amendment. Despite the inclusion of the states and their instrumentalities and political subdivisions in the definition of "employer" under the ADEA, the provision of the ADEA setting forth a private cause of action does not reference states as possible defendants. 29 U.S.C. Section 626(c).

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[5] An explicit reference to sovereign immunity or the Eleventh Amendment is not required. Dellmuth, 491 U.S. at 233 (Scalia, J., concurring). The text must contain "unmistakably clear" language, that states may be sued in federal court, however. Humenansky, 152 f.3d at 824 (*citing* Seminole, 517 U.S. at 56-57). In Seminole, suits against states in federal court were clearly contemplated by Congress in enacting the Indian Gaming Regulatory Act, as jurisdiction over causes of action under that Act was vested exclusively in the federal courts, and the only defendants subject to actions brought by Indian tribes under the act were states themselves. Thus, in Seminole, "sovereign immunity" was coextensive with Eleventh Amendment immunity although, generally, a state's Eleventh Amendment immunity is distinguishable from its sovereign immunity. *See Atascadero*, 473 U.S. at 240, n. 2.

Essentially the same language was held by the Court to be insufficient to abrogate a state's Eleventh Amendment immunity in Employees of the Department of Public Health and Welfare, 411 U.S. at 283 (holding that states' immunity from suit in federal court under the Eleventh Amendment was not abrogated by language providing that an action under the FLSA "may be maintained in any court of competent jurisdiction"). Thus, the language in the ADEA itself is insufficient to abrogate a state's Eleventh Amendment immunity.[6] "The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim." Seminole, 517 U.S. at 56 (*quoting* Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775, 786, n.4 (1991)); *see also* Dellmuth, 491 U.S. at 228, 231 (provision which allowed parties aggrieved under the Education for All Handicapped Act to "bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy, . . in no way intimates that the States' sovereign immunity is abrogated").

Proponents of abrogation, including the Court of Appeals for the Tenth Circuit and others concurring with its holding in this case and in Hurd I and Hurd II, rely on the crossreference in the enforcement provision of the ADEA to the enforcement provision of the FLSA, to provide the necessary textual evidence of congressional intent to abrogate Eleventh Amendment immunity of the states from suit by a

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[6] In 1974, both the ADEA definition of "employer" and the FLSA enforcement provision (29 U.S.C. Section 621(b)), which is cross-referenced in the ADEA (at 29 U.S.C. Section 216(b)), were amended by the Fair Labor Standards Amendment of 1974, U.S. Pub. L. No. 93-259. The text of that public law refers to the FLSA and the ADEA as separate acts, however.

private party in federal court. That reliance is misplaced first because a crossreference to the enforcement provisions of another statute does not satisfy the rule established by Atascadero and second because the enforcement provision of the FLSA, referenced in the ADEA, does not establish an unequivocal textual intention of Congress to abrogate the states' Eleventh Amendment immunity.

While the legislative history of the 1974 amendments to the FLSA does evidence Congress' intention that state employees be provided a right of action in the federal courts under the FLSA, no mention is made of providing the same right to state employees under the ADEA.[7] H.R. Rep. No. 93-913, reprinted in 1974 U.S.C.C.A.N. 2811, 2816-17, 2825, 2849-50, 2853, 2860. Assuming that the legislative history of the FLSA also applies to the ADEA, confusion remains with respect to 29 U.S.C. Section 626(c) (the private cause of action provision of the ADEA that permits suit in "any court of competent jurisdiction"). If Congress intended to subject the states to suit in federal court under the ADEA, 29 U.S.C. Section 626(c) should have been amended as was the FLSA, to attempt to address the deficiency identified by the Court in Employees of the Department of Public Welfare.

In Atascadero, the Court considered whether the remedies set forth in Section 504 of the Rehabilitation Act, 29 U.S.C. Section 794a, provided the requisite expression of

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[7] Further, legislative history is irrelevant to a determination of an unequivocal textual expression of congressional intent to abrogate. Dellmuth, 491 U.S. at 230. "If Congress' intention . . . is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of Atascadero will not be met." *Id.*

Congressional intent to abrogate the states' Eleventh Amendment immunity.[8] The Court held that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically," Atascadero, 473 U.S. at 246 (*citing* Pennhurst II, 465 U.S. at 99) and "in unmistakable language in the statute itself." 473 U.S. at 243. The Court held that the Rehabilitation Act did not abrogate the states' Eleventh Amendment immunity.

The enforcement provision of the ADEA also does not provide the requisite unequivocal expression of intent;[9] the section does not mention the term "employer" and does not refer to suits against states in federal courts. What § 626(b) does reference are provisions contained in the FLSA which address use of state and local agencies and employees by the Secretary of Labor in carrying out his duties under the FLSA, Section 211(b), and injunctive proceedings, Section 217. Section 216(b) permits private enforcement in "[a]n action . . . maintained against any employer (including a public

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[8] That section provides: "The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. Section 2000d *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."

[9] 29 U.S.C. § 626(b) provides: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section."

agency) in any Federal or State court of competent jurisdiction . . . ."

But whether a federal court is a court of competent jurisdiction when a state is the employer against whom suit is brought by a private party seeking damages is not clear. States have immunity from such suits under the Eleventh Amendment. Kimel, 139 F.3d at 1432, n. 11 (Edmondson, J.). The same result was reached by this court in Dellmuth, which found similar language insufficient for purposes of abrogation.

Therefore, whether Congress intended to abrogate Eleventh Amendment immunity when it amended the FLSA and ADEA in 1974 is not clear. *Compare* 29 U.S.C. Section 216(b) and 29 U.S.C. Section 626(c). An oversight "is not a proper basis for finding 'unmistakably clear' intent to abrogate." Humenansky, 152 F.3d at 825 (*citing* Dellmuth, 491 U.S. at 232 (a "permissible inference" of intent to abrogate is not sufficient)). The clear and unmistakable textual expression of intent to abrogate, as required by the Court in Atascadero and Dellmuth, is absent from the ADEA.

2. THE ADEA WAS ENACTED UNDER THE COMMERCE CLAUSE AND IS NOT A VALID ENACTMENT UNDER THE FOURTEENTH AMENDMENT.

Congress can pass legislation only when the Constitution gives it the authority to do so. Seminole, 517 U.S. at 58. "[C]ommerce power alone is insufficient authority for Congress to abrogate state sovereign immunity." Wilson-Jones v. Caviness, 99 F.3d 203, 207 (6th Cir. 1996)(*citing* Seminole). Abrogation requires an enactment based on the Fourteenth Amendment because that amendment

"operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." Seminole, 517 U.S. at 65. For the ADEA to validly abrogate a state's Eleventh Amendment immunity, Congress must have acted pursuant to the Fourteenth Amendment. The legislative history and case law unequivocally dictate that the ADEA was enacted pursuant to Congress' power under the Commerce Clause which does not provide the requisite authority.

The ADEA was enacted in 1967, based on Congress' belief that "the existence in industries affecting commerce of arbitrary discrimination in employment because of age burdens commerce and the free flow of commerce." 29 U.S.C. § 621(a). An employer is defined partly as one "engaged in an industry affecting commerce." 29 U.S.C. § 621(b). The House Report provides that the "investigation and enforcement provisions of the bill essentially follow those of the Fair Labor Standards Act." H.R. Rep.No. 90-805, reprinted in 1967 U.S.C.C.A.N. 2213, 2218. The FLSA has historically been recognized as a Commerce Clause enactment. United States v. Darby, 312 U.S. 100 (1941); Wilson-Jones, 99 F.3d at 207; Aaron v. Kansas, 115 F.3d 813 (10th Cir. 1997).

Congress amended the ADEA in 1974 and the FLSA in 1966 to make those laws applicable to governmental entities. The FLSA enforcement clause was further amended in 1974 to address the Supreme Court's decision in Employees of the Dept. of Public Welfare. But those amendments did not alter the Commerce Clause underpinnings of the Acts. That Congress considered the FLSA to be a Commerce Clause enactment is not in doubt. *E.g.*, 120 Cong.Rec. 7337 (1974). If the FLSA extension in 1966 to governmental entities did not alter the Commerce Clause basis

for the FLSA, the same extension should not similarly demonstrate Congressional intention to alter the Commerce Clause basis of the ADEA. The articulated goal of the ADEA to enhance the free flow of commerce was confirmed. 29 U.S.C. § 621(a). When the ADEA was amended in 1974, it continued to be tied to the FLSA which was also amended. There was no change, however, in the constitutional basis underlying those enactments.

Rules of statutory construction support this conclusion. Looking first to the language of the act itself as required by Seminole, the ADEA does not specify a Congressional intent to abrogate Eleventh Amendment immunity. *See* discussion above. The definitions contained in the ADEA reference Congress' concerns with commerce. The emphasis on the statutory purpose is to prohibit burdens on commerce which result from discrimination on the basis of age. The focus is not on the discrimination aspect, but on the burden that discrimination places on commerce. There is no reference to the Fourteenth Amendment.

This Court's decisions further demonstrate that age has not been a recognized classification which the Fourteenth Amendment was intended to protect:

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities . . . [O]ld age does not define a

> "discrete insular group," in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live our normal span.

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976)(citations omitted). Murgia held that the Equal Protection Clause bars age-based classifications only if they are completely irrational. Gregory, 501 U.S. at 470.

The Equal Protection Clause has not been used to invalidate rational classifications based on age. States are permitted to determine when a person must retire. Gregory (upholding mandatory retirement age for judges) and Murgia (sustaining mandatory retirement for police officers).[10] Age-based classifications are permitted unless arbitrary or irrational, while no classifications on the basis of the immutable characteristics recognized in Fourteenth Amendment jurisprudence may be generally considered in issues such as qualifications for public employment. If the ADEA had been enacted pursuant to the Fourteenth Amendment, it would allow discrimination, with rational

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[10] States may constitutionally consider age in determining when persons may attend public school, Hammond v. Marx, 406 F.Supp. 853 (D.Me. 1975), play school sports, Blue v. University Interscholastic League, 503 F.Supp. 1030 (N.D. Tex. 1980), take the bar exam, Baccus v. Karger, 692 F.Supp. 290 (S.D.N.Y. 1988), receive property tax benefits, Nordlinger v. Hahn, 505 U.S. II (1992), lose workmens' compensation benefits, Sasso v. Ram Property Management, 431 So.2d 204 (Fla. Dist. Ct. App. 1983), *appeal dismissed*, 469 U.S. 1030 (1984) and become subject to criminal adult sanctions. Cunningham v. United States, 256 F.2d 467 (5th Cir. 1958).

basis scrutiny, against older persons. Mandatory retirement laws for judges and police officers, for example, have been upheld. *See* Gregory, 501 at 469-70 (upholding mandatory retirement age for judges) and Murgia (sustaining mandatory retirement for police officers). There is no similar carving out for black police officers or judges, under statutes where strict scrutiny would apply.[11] The potential parsing of to whom the protection would flow militates against the ADEA having its basis in the anti-discrimination measures of the Fourteenth Amendment.

Because of the differences in the underlying premises of the Fourteenth Amendment and the ADEA, the Constitutional authorization for the ADEA is not derived from the Fourteenth Amendment. Not only does the language of the ADEA fail to reference protections found in the Fourteenth Amendment, its scope actually permits differential treatment on the basis of age that would otherwise be prohibited if the Fourteenth Amendment provided the Constitutional underpinning.

This Court's opinions support the Commerce Clause basis of the ADEA. In EEOC v. Wyoming, 460 U.S. 226, 243 (1983), the majority of a sharply divided Court held that "the extension of the ADEA to cover state and local governments . . . was a valid exercise of Congress' powers under the Commerce Clause." Although the conclusion that Congress could validly abrogate states' Eleventh Amendment

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[11] That the ADEA exceeds the requirements of the rational basis test was clearly established by this Court in Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (employer must establish more than a rational basis in fact for believing that identification of unqualified persons cannot occur on an individual basis).

immunity under its Commerce Clause power was overruled in Seminole, the Court's conclusion that the ADEA was enacted pursuant to the Commerce Clause was the expressed opinion of the Court and four dissenting justices.

In Gregory, 501 U.S. at 469-70, the Court held that, in enacting the ADEA, the appropriate test for determining whether Congress intended to enforce the guarantees of the Fourteenth Amendment was the test articulated in Pennhurst I. The Court noted that in prior instances in which Congress had intended to exercise its Fourteenth Amendment powers, it had specifically so stated. In Pennhurst I, there was no statement of Congressional intent and the Court considered the constitutional basis under which Congress had acted. This Court confirmed, as it did in City of Boerne, that Congressional action pursuant to the Fourteenth Amendment should not be quickly inferred, given the intrusiveness of such enactments on the states. Pennhurst I, 451 U.S. at 16.[12] Further, some statement in the legislation must reflect Congress' intention to impose obligations under the Fourteenth Amendment. With Congressional silence, such obligations are not to be inferred. Given these considerations, Pennhurst concluded that the law at issue was not enacted pursuant to the Fourteenth Amendment but was, instead, based on Congress' spending power.

The same result, that the ADEA was not enacted under the Fourteenth Amendment but was, in fact, a Commerce

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[12] "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." 451 U.S. at 16.

Clause enactment, should be reached. The only articulated basis for that Act was the need to relieve commerce from the burdens of age discrimination which deprived the national economy of the productive labor of millions of individuals. EEOC v. Wyoming, 460 U.S. at 229-31. Only employers engaged in commerce were subject to the act's provisions. 29 U.S.C. § 630(b). Because there is no reference or inference that Congress intended its enactment of the ADEA to be pursuant to the Fourteenth Amendment, the constitutional right of states to be immune from suit by private parties in federal court has not been abrogated by the ADEA. The Commerce Clause is the only authority for Congress' enactment of the ADEA.

The Tenth Circuit's failure to recognize the Commerce Clause basis for the ADEA should be reviewed by this Court. Although the Tenth Circuit believed itself bound by its earlier decisions in the Hurd cases, it should have revisited the issue and altered its opinion based on this Court's Eleventh Amendment jurisprudence. Petitioners request that this Court now review this issue because of the Tenth Circuit's erroneous interpretation of Supreme Court precedent.

3. THE ADEA IS NOT REMEDIAL LEGISLATION, AS DEFINED IN CITY OF BOERNE, BECAUSE IT WAS NOT ENACTED TO ELIMINATE DOCUMENTED EVIDENCE OF AGE-BASED DISCRIMINATION AND BECAUSE THE ADEA PROVIDES REMEDIES OUT OF ALL PROPORTION TO THE HARM SOUGHT TO BE CURED.

City of Boerne recognized that Congress had power under the Fourteenth Amendment to enact only remedial legislation, *i.e.*, legislation that deters or remedies violations of Section 5. To be remedial legislation, "[t]here must be a

congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 117 S.Ct. at 2164. If the legislation imposes sanctions out of proportion to the seriousness of any demonstrated constitutional injury, then the legislation is not remedial, but substantive and is invalid under the Fourteenth Amendment. *Id.*

The Tenth Circuit recognized the stringent requirements articulated in City of Boerne, citing this Court's invalidation of the Religious Freedom Restoration Act ("RFRA") because the "legislative record was devoid of any showing laws were being passed because of religious bigotry that justified the [RFRA's] extreme measures." 158 F.3d at 1137, App. 11a. The Tenth Circuit concluded that the ADEA was remedial legislation, proportional to the injury sought to be prevented. The ADEA, however, like RFRA, is not supported by findings of discrimination and is not proportional to any constitutional injury.

The Tenth Circuit identified the legislative findings on which it based its conclusion, but that history does not demonstrate that Congress was presented with the type of evidence of discrimination by the states on the basis of age required by City of Boerne to justify enactment of the ADEA under the Fourteenth Amendment. The Tenth Circuit broadly held that the legislative history "indicate[s] that arbitrary age discrimination is a real problem in the workplace." The findings found persuasive included the statement of purpose which provides that "the incidence of unemployment, especially long-term unemployment . . . is, relative to the younger ages, high among older workers." Migneault, 158 F.3d at 1138, App. 13a. (*citing* 29 U.S.C. § 621(a)(2), (3)). This statement, however, is not a finding of age discrimination. It is a finding that supports the unremarkable

proposition that a person who has been unemployed for a long period of time is probably older than an individual who has not been unemployed for a long time.

The Tenth Circuit also cited the Senate and House Committee reports which quoted with approval the President's recommendation for passage of the legislation recognizing that age discrimination could be as invidious as discrimination based on race or religion. S.Rep.No. 690, 93rd Cong., 2d Sess. 55 (1974); H.R.Rep.No. 913, 93rd Cong., 2d Sess. 40 (1974). There was no finding by Congress that such discrimination was invidious. This comparison with regard to religion was rejected in City of Boerne as providing an insufficient basis for the RFRA and it should similarly be insufficient to provide the documented evidence of discrimination required to support the ADEA. Further, there is no Congressional finding, statement or evidence that states were discriminating on the basis of age.

The other extracts of legislative history cited by the Tenth Circuit also fail to provide any evidence of discrimination by the states. For example, a senator seeking to extend the ADEA to the states in 1972 commented that "there is very disturbing evidence to suggest that the *Federal Government* . . . may be a leading offender in applying pressure tactics to coerce older workers to retire at an early age." 118 Cong.Rec. 7745 (1972) (emphasis added); *see also* Sen.Rep.No. 93-846, 93rd Cong., 2d Sess. at 112 (1974) (finding that in federal government employment, older employees had been singled out for reductions-in-force and that emphasis on early retirement placed an unequal burden on middle aged workers). Providing additional, more current support is the recognition that, although older workers face obstacles in employment and may, in some circumstances be subjected to discrimination on the basis of age, "there is no

agreement on the extent of [such] age-based discrimination . . ." Sen.Rep.No. 36, Pt. 1, 105th Cong., 1st Sess. 77 (1997), and there is no mention of the extent, if any, of discrimination by state governments.[13]

Second, the ADEA prohibits nearly all state actions based on age classifications, even those which may be rationally related to a legitimate state interest. As with RFRA, the ADEA "ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." City of Boerne, 117 S.Ct. at 2170. The anti-discrimination prohibitions of the ADEA apply to approximately one half of the population, those over 40 years of age, and are without limit. The ADEA imposes a standard of review on state action that far exceeds the requirements of the Fourteenth Amendment. *E.g.*, 29 U.S.C. § 623 (a) - (f). Thus the ADEA cannot be deemed an effort to remedy prior state age-based discrimination. What it does is impermissibly create new rights not heretofore protected under the Fourteenth Amendment.

If this court's opinion in City of Boerne is to have any validity, it dictates rejection of the ADEA as an enactment under the Fourteenth Amendment. Under the test articulated, the ADEA is substantive legislation, not narrowly tailored to redress specific, documented incidents of age-based discrimination. It was thus not enacted under the Fourteenth

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[13] It would seem incongruous that evidence of discrimination by universities on the basis of age could be demonstrated, given the tenure system existing in most universities that would ensure the continued employment of many older workers.

Amendment and Congress could not validly abrogate the States' Eleventh Amendment immunity.

III. CONCLUSION

This Court should grant this petition to resolve the issues of significant importance raised. The Court previously provided guidance in Seminole as to the Fourteenth Amendment basis required for a valid abrogation of the states' Eleventh Amendment immunity. The Court further provided guidance in City of Boerne as to the justification required for valid abrogation and enactment under the Fourteenth Amendment. What has remained unresolved is the practical application of these tests: whether Congress' enactment of the ADEA satisfies each of these concerns. This case presents the Court with the opportunity to provide the practical guidance necessary for implementation of the concepts articulated in Seminole and City of Boerne.

Respectfully submitted,

/s/_____
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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed October 23, 1998]

No. 97-2099

JOANNE B. MIGNEAULT, Plaintiff-Appellee v. RICHARD PECK, President; DAVID L. McKINNEY, Vice President for Business and Finance; PAUL ROTH, M.D., Dean of the School of Medicine; ROMEO ORTIZ, Director of Human Resources, Defendants, and UNIVERSITY OF NEW MEXICO; JANE E. HENNEY, M.D., Vice President for Health Sciences, Defendants-Appellants,	**Appeal from the United States District Court for the District of New Mexico No. CIV-96-385-JC**

UNITED STATES OF AMERICA,)
Intervenor,)
)
AMERICAN ASSOCIATION OF)
RETIRED PERSONS,)
Amicus Curiae.)
_____/

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-96-385-JC)

Donna L. Dagnall, Albuquerque, New Mexico, for Plaintiff-Appellee.

Paula I. Forney of Law Offices, Santa Fe, New Mexico, for Defendants-Appellants.

Seth M. Galanter (Jessica Dunsay Silver with him on the brief), Department of Justice, Washington, D.C., for the Intervenor.

Cathy Ventrell-Monsees and Laurie A. McCann of American Association of Retired Persons, Washington, D.C., on the brief for Amicus Curiae.

Before PORFILIO, McKAY and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

Plaintiff Joanne Migneault brought this action against the University of New Mexico ("the University"), its Board, and several of its employees under 42 U.S.C. 5 1983 and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 55

621-634. She alleged, *inter alia,* the defendants failed to hire her for an employment position due to age discrimination in violation of the ADEA and the Equal Protection Clause of the Fourteenth Amendment. This appeal arises out of the district court's interlocutory order denying (1) Eleventh Amendment immunity to defendant University from Ms. Migneault's ADEA claim, and (2) qualified immunity to defendant Dr. Jane Henney from Ms. Migneault's 5 1983 claim alleging a violation of her equal protection rights. The University and Dr. Henney appeal the district court's denial of the defendants' motions to dismiss and for summary judgment on these issues. We exercise jurisdiction pursuant to 28 U.S.C. 5 1291. We affirm in part and reverse in part.

BACKGROUND

Ms. Migneault was an employee of the University, a state institution, from March 1982 through December 1994. She was placed on lay-off status in March 1994 and laid off in June 1994, after the University decided to eliminate her position as Assistant to the Director of the Center for Non-Invasive Diagnosis. The University, however, permitted her to work through December 1994. During the time period at issue, she was married to Robert L. Migneault, the Dean of Library Sciences at the University. She was over forty years old at all relevant times.

In March 1994, Ms. Migneault applied for the position of Executive Secretary to the Vice President for Health Sciences at the University. The position was two grades lower on the University personnel scale than her position at the Center for Non-Invasive Diagnosis and paid roughly $10,000 less than her salary at that time. Dr. Henney, the Vice President of

Health Sciences, interviewed four finalist candidates for the Executive Secretary position, including Ms. Migneault. Three of the four candidates were over the age of forty. Dr. Henney ultimately hired Ms. Rose Johnson, who was under forty years old. Ms. Migneault was told she was not offered the job because she was overqualified and because there was a feeling she would not be happy in the position. Ms. Migneault alleges these reasons were pretextual for age discrimination.[1]

On March 28, 1995 Ms. Migneault filed an age discrimination charge under the ADEA with the Equal Employment Opportunity Commission. After the requisite sixty days elapsed with no EEOC action, Ms. Migneault filed this lawsuit claiming the defendants: (1) violated the ADEA by terminating her position and not hiring her for the Executive Secretary position or for another position (Administrator Coordinator III) because of her age; (2) violated the First Amendment by refusing to consider her for an appropriate position at the University because of her affiliation and support for the Center for Non-Invasive Diagnosis and her marriage to a Dean on campus; (3) violated the Equal Protection Clause by violating her First Amendment rights and the ADEA; (4) violated her procedural and substantive due process rights as guaranteed by the Fifth and Fourteenth Amendments by violating the University's Business Policy Provisions; and (5) retaliated against her for

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[1] She claims the reasons were pretextual because: she was a better qualified candidate than Ms. Johnson; contrary to Dr. Henney's assertion, she never stated during her interview that she could just do secretarial work; and she alleges Dr. Henney asked her during her interview why she would want to retire in the position.

filing a charge with the Equal Employment Opportunity Commission by failing to return her from layoff status.

On June 13, 1996, the defendants moved to dismiss Ms. Migneault's claims. The defendants subsequently moved for summary judgment on December 2, 1996. The district court ruled on both motions together, granting them in part and denying them in part. The district court's order dismissed all Ms. Migneault's claims except for her ADEA claim against the University and her equal protection claim under § 1983 against Dr. Henney.[2]

In its motion to dismiss, the University claimed Ms. Migneault's ADEA suit was barred by Eleventh Amendment immunity. It claimed Congress did not validly abrogate states' Eleventh Amendment immunity since the ADEA was not enacted pursuant to the Fourteenth Amendment under which Congress derives its sole constitutional authority to abrogate.

The University further claimed Congress could not have enacted the ADEA pursuant to its powers under the Fourteenth Amendment because age is not a suspect class. The district court rejected both arguments, relying on *Hurd v. Pittsburgh State Univ.*, 29 F.3d 564 (10th Cir.), *cert. denied,* 513 U.S. 930 (1994), where this court specifically held the ADEA, as amended, was enacted pursuant to Congress' legislative power under § 5 of the Fourteenth Amendment. The court thus denied the University's motion to dismiss on Eleventh Amendment grounds.

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[2] The district court also ruled on the defendant's motion to strike the plaintiffs affidavit which is not at issue in this appeal.

In the defendants' summary judgment motion, Dr. Henney argued she was immune from Ms. Migneault's equal protection claim under the doctrine of qualified immunity. She claimed she was entitled to the immunity because Ms. Migneault failed to show Dr. Henney's actions violated clearly established law. The district court rejected Dr. Henney's argument, ruling she was not entitled to qualified immunity. In doing so, the court found Ms. Migneault's complaint stated an equal protection violation and the illegality of age discrimination was clearly established such that a reasonable person in Dr. Henney's position would have understood her conduct violated the Equal Protection Clause. Consequently, the district court denied Dr. Henney's motion for summary judgment on this issue.

ANALYSIS

Eleventh Amendment Immunity

We review *de novo* the district court's denial of a motion to dismiss for lack of subject matter jurisdiction, *see Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941,944 (10th Cir. 1995), and the claim that a suit is barred by the Eleventh Amendment. *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1483 (10th Cir. 1995).

The Eleventh Amendment to the United States Constitution restricts federal jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although by its language the Eleventh Amendment might appear to apply only to cases against states relying on federal diversity jurisdiction,

the Supreme Court has long interpreted it to extend to suits arising under the federal constitution or federal law. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54 (1996) *(citing Hans v. Louisiana,* 134 U.S. 1, 11-14 (1890)).

Eleventh Amendment immunity is not absolute. A state may consent to be sued in federal court, or Congress may abrogate sovereign immunity. *See Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 (1985). To abrogate Eleventh Amendment immunity, Congress must have "'unequivocally expresse[d] its intent to abrogate the immunity,'" and "acted 'pursuant to a valid exercise of power.'" *Seminole Tribe,* 517 U.S. at 55 (quoting *Green v. Mansour,* 474 U.S. 64, 68 (1985)) (alteration in original). After the Court's ruling in *Seminole Tribe,* it is clear Congress may only abrogate Eleventh Amendment immunity when it acts pursuant to its legislative authority under § 5 of the Fourteenth Amendment. *Id.* at 59, 65-66.

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The statute excludes from its coverage age discrimination that is reasonably necessary to satisfy bona fide occupational qualifications or is based on reasonable factors other than age. *Id.* § 623(f). An employer violating the ADEA may be liable for legal and equitable relief. *Id.* § 626(b), (c). The 1974 amendments to the ADEA added to the definition of employer, a State, its political subdivisions, agencies or instrumentalities. Pub. L. 93-259, § 28(a)(1)-(4), Apr. 8, 1974, 88 Stat. 55 (codified as 29 U.S.C. § 630(b)). The

parties do not dispute the University is an employer under the ADEA.

The University claims the ADEA did not validly abrogate Eleventh Amendment immunity as it was enacted pursuant to the Commere Clause rather than the Fourteenth Amendment, and does not contain an unequivocal intent to abrogate. In the alternative, the University argues the ADEA exceeds Congress' power to legislate under § 5 of the Fourteenth Amendment.

We can summarily dispose of the bulk of the University's argument since we have already ruled on this precise issue. In *Hurd v. Pittsburg State University,* 109 F.3d 1540, 1546 (10th Cir. 1997), this court unequivocally held Congress validly abrogated Eleventh Amendment immunity by exercising its authority under the Fourteenth Amendment to enact the ADEA and by indicating its intent to abrogate. As another panel of this circuit has already decided this issue, we cannot address the University's claim absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court.[3]

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[3] Even if we could revisit *Hurd,* our conclusion the ADEA amendment was enacted under the Fourteenth Amendment would remain unchanged. The *Hurd* case involved two opinions of this court addressing whether lawsuits against states under ADEA were barred by Eleventh Amendment immunity. *See Hurd v. Pittsburg State Univ.*, 29 F.3d 564 (10th Cir. 1994) *(Hurd I); Hurd v. Pittsburg State Univ.*, 109 F.3d 1540 (10th Cir. 1997) *(Hurd II).* In *Hurd I, a pre-Seminole Tribe* opinion, we concluded Congress intended to abrogate that immunity when it passed the ADEA, but we did not address under which authority Congress acted, *i.e.*, the

Finley v. United States, 82 F.3d 966, 974 (10th Cir. 1996) ("[A]n overruling of prior Tenth Circuit precedent ... lies beyond the power of this tribunal."); *In re Smith,* 10 F.3d 723,724 (10th Cir. 1993) ("We are bound by the precedent of prior panels absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court."), *cert. denied,* 513 U.S. 807 (1994).

The University claims *City of Boerne v. Flores,* __ U.S. __, 117 S. Ct. 2157 (1997), is superseding Supreme Court authority for the proposition Congress exceeded its authority under § 5 of the Fourteenth Amendment in enacting the ADEA.

In City of Boerne, the Court struck down the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et*

Commerce Clause or the Fourteenth Amendment. 29 F.3d at 564. *Hurd II* revisited the *Hurd I* ruling in light of the intervening *Seminole Tribe* decision. 109 F.3d at 1542. In *Hurd II,* we applied the *Seminole Tribe* analysis and concluded Congress clearly intended to abrogate Eleventh Amendment immunity when enacting the ADEA. *Id.* at 1543-44. We further held Congress exercised its power to abrogate under {} 5 of the Fourteenth Amendment. *Id.* at 1544-46. These conclusions were supported by several of our sister circuit court decisions that reviewed the legislative history to the 1974 ADEA amendments in detail. *Id.* at 1545-46 (citing, *inter alia, Davidson v. Board of Governors,* 920 F.2d 441,443 (7th Cir. 1990); *Ramirez v. Puerto Rico Fire Serv.,* 715 F.2d 694, 699-700 (lst Cir. 1983); *Arritt v. Grisell,* 567 F.2d 1267, 1270-71 (4th Cir. 1977)).

Furthermore, contrary to the University's claim, *post-Seminole Tribe* decisions at the federal circuit

seq., on the grounds its enactment exceeded Congress' power to legislate under § 5 of the Fourteenth Amendment.[4] *City of Boerne*, __ U.S. at __., 117 S. Ct. at 2169-72. Congress enacted the Religious Freedom Restoration Act in direct response to the Supreme Court's ruling in *Employment Div., Dep't. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Id.* at 2160. In *Smith*, the Court held the Free Exercise Clause does not require neutral, generally applicable laws that burden religious practices to be justified by a compelling governmental interest. *Smith*, 494 U.S. at 883-85. To protect religious freedom after *Smith*, the Religious Freedom Restoration Act required all laws, including laws of general applicability, which substantially burden a person's exercise of religion be justified by furthering a compelling governmental interest and be the least restrictive means to further that interest. *City of Boerne*, __ U.S. at, 117 S. Ct. at 2162. The Act applied to all federal, state, and local laws. *Id.* It therefore imposed a demanding standard on a wide variety of laws which might have no relationship to religious bigotry.

In striking down the Religious Freedom Restoration Act, the Court explained Congress may only enact legislation under § 5 that deters or remedies violations of the Fourteenth Amendment. *Id.* at 2163-64. To qualify as remedial legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 2164. "The appropriateness of remedial measures must be considered in light of the evil

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[4] Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." U.S. Const. amend, XIV, § 5.

presented." *Id.* at 2169. If the legislation at issue imposes burdens far greater than the seriousness of any demonstrated constitutional injury requiring such measures, then the legislation does not remediate the constitutional violation but creates substantive change in constitutional protections. *Id.* at 2163-70.

In City of Boerne, the Court recognized Congress had the constitutional authority to enact legislation under § 5 to enforce the Free Exercise Clause. *Id.* at 2163. However, the Court found the Religious Freedom Restoration Act's demanding, compelling interest standard and its broad coverage to all laws, even laws of general applicability, were so out of proportion to any demonstrated pattern or practice of unconstitutional conduct burdening the exercise of religion that the Act could not be remedial. *Id.* at 2171. The legislative record was devoid of any showing laws were being passed because of religious bigotry that justified the Religious Freedom Restoration Act's extreme measures. *Id.* at 2169. Therefore, the Court held the legislation exceeded Congress' legislative powers under § 5 of the Fourteenth Amendment. *Id.* at 2172.

Applying the *City of Boerne* analysis to evaluate the constitutionality of the ADEA, we conclude the ADEA is within Congress' legislative authority under § 5 of the Fourteenth Amendment. We first observe Congress has the authority under § 5 to legislate against arbitrary age discrimination. Section 5 empowers Congress to enforce the provisions of the Fourteenth Amendment, including the Equal

Protection Clause.[5]

The Equal Protection Clause protects against arbitrary discrimination by the states. *See Bankers Life & Cas. Co. v. Crenshaw,* 486 U.S. 71, 83 (1988) (stating "arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review" in the context of the court's constitutional review of a state statute); *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its .jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.'"). More specifically, the Equal Protection Clause protects against arbitrary age discrimination. *See Gregory v. Ashcrofi,* 501 U.S. 452, 470 (1991) (recognizing arbitrary age discrimination may violate the Equal Protection Clause when the Court applied the rational basis test to a retirement provision of a state constitution setting mandatory retirement for judges at age seventy); *see also Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314 (1976) *(per curiam)* (rational basis test applied to a state law mandating retirement at age fifty).

The fact age is not a suspect or quasi-suspect classification does not mean arbitrary age discrimination is not violative of the Equal Protection Clause. *See City of Cleburne,* 473 U.S. at 446 ("Our refusal to recognize the retarded as a quasi-

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[5] The Equal Protection Clause of the Fourteenth Amendment states: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

suspect class does not leave them entirely unprotected from invidious discrimination."); *Goshtasby,* 141 F.3d at 771 ("The Supreme Court's equal protection jurisprudence is not confined to traditional suspect or quasi-suspect classifications."); *Crawford v. Indiana Dep't of Corrections,* 115 F.3d 481,487 (7th Cir. 1997) (stating "invidious discrimination by governmental agencies ... violates the equal protection clause even if the discrimination is not racial [a suspect class]."). Because arbitrary age discrimination violates the Equal Protection Clause of the Fourteenth Amendment, we conclude Congress has the legislative power under § 5 to deter or remedy such discrimination.

We also conclude the ADEA is remedial, as opposed to substantive, in nature. The ADEA's scope is limited to the unconstitutional conduct Congress seeks to prevent. Congressional findings and legislative history indicate arbitrary age discrimination is a real problem in the workplace. In its statement of findings and purpose to the ADEA, Congress found "arbitrary age limits regardless of potential for job performance has become a common practice" and the "incidence of unemployment, especially long-term unemployment ... is, relative to the younger ages, high among older workers." 29 U.S.C. § 621 (a)(2), (3). Congress' findings were based on extensive factfinding by the Executive Branch and Congress of age discrimination in employment. *EEOC v. Wyoming,* 460 U.S. 226, 229-233 (1983) (reviewing the legislative history of the ADEA in detail). Both Senate and House committees in passing the 1974 ADEA amendments cited remarks made by the President in 1972 that:

[d]iscrimination based on age -- what some people call "age-ism" --can be as great an evil in our society as discrimination

based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work ....

S. Rep. No. 93-690 at 55, H.R. Rep. No. 93-913, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2849. Congress recognized age discrimination was occurring in the *public* sector as well. *See Goshtasby,* 141 F.3d at 772 (citing S. Rep. No. 846, 93d Cong., 2d Sess. 112 (1974); Senate Special Comm. on Aging, Improving the Age Discrimination Law, 93d Cong., 1st Sess. 14 (Comm. Print 1973); 118 Cong. Rec. 7,745 (1972) (remarks of Sen. Bentsen)). We recognize the legislative history does not provide specific or detailed evidence of discrimination; however, specific evidence is not required for Congress to legislate under § 5. "Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'" *City of Boerne,* __ U.S. at __, 117 S. Ct. at 2170 (quoting *Oregon v. Mitchell,* 400 U.S. 112, 207 (1970) (opinion of Harlan, J.). Giving such deference, we believe the ADEA is adequately supported by congressional findings demonstrating a need to remedy age discrimination.

More important, the means utilized by the ADEA to deter or remedy age discrimination are proportional to the constitutional violations it seeks to prohibit. Rather than having a sweeping coverage as the Religious Freedom Restoration Act, the ADEA is narrowly confined to combat the problem at issue, *arbitrary* age discrimination. Only

arbitrary age discrimination is prohibited by the ADEA. Age discrimination that can be supported by non-arbitrary reasons is not affected.[6]

See 29 U.S.C. § 623(f). In addition, consistent with congressional findings that age discrimination especially affects older workers, *see id.* § 621 (1)-(3), the ADEA limits its coverage to age discrimination for workers who are at least forty but less than seventy years old, *id.* § 631 (a). Hence, the ADEA is remedial because its application is proportional to the conduct, arbitrary age discrimination among older workers, that it seeks to prevent. As we conclude the ADEA is remedial, Congress acted within its enforcement powers under § 5 of the Fourteenth Amendment in enacting the ADEA.

We hold, therefore, the *City of Boerne* decision does not alter our prior decision in *Hurd* that Congress acted within its authority under the Fourteenth Amendment to abrogate Eleventh Amendment immunity from suits under the ADEA. We recognize there is a split in the circuits on this issue. However, we join the majority of other appellate courts that have addressed this issue since the *City of Boerne* decision. *See Coger,* 154 F.3d 296; *Scott,* 148 F.3d 493; *Goshtasby,* 141 F.3d at 769-72; *but see Humenansky,* 152 F.3d 822

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[6] For example, the ADEA does not make it unlawful for an employer to discriminate against an employee on the basis of age where "age is a bona fide occupational qualification," where differentiation is based on reasonable factors other than age, or where the employee's workplace is in another country and compliance with ADEA would cause the employer to violate the laws of that country. 29 U.S.C. § 623(f)(1).

(concluding the ADEA exceeds Congress'§ 5 powers as defined in *City of Boerne); Kimel,* 139 F.3d at 1445-48 (Cox, J., dissenting). Accordingly, we affirm the district court's denial of Eleventh Amendment immunity to the University.

Qualified Immunity

Dr. Henney argues she is immune from Ms. Migneault's equal protection claim under the doctrine of qualified immunity. The doctrine of qualified immunity shields government officials from suit when their conduct does not "'violate clearly established statutory or constitutional fights of which a reasonable person would have known.'" *Gehl Group v. Koby,* 63 F.3d 1528, 1533 (10th Cir. 1995) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth,* 472 U.S. 511,526 (1985). The doctrine allows courts to expeditiously weed out suits against government officials which fail to establish a violation of a clearly established fight prior to imposing the burdens of discovery and litigation. *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). Therefore, when the district court denies qualified immunity on an issue of law, as in this case, [7] the decision is immediately appealable as a "final decision" under 28 U.S.C. § 1291. *Patrick v. Miller,* 953 F.2d 1240,

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[7] Our 28 U.S.C. § 1291 jurisdiction is appropriately exercised over this interlocutory claim because the district court's decision denying qualified immunity was based on an issue of law rather than sufficiency of the evidence. The district court denied summary judgment to Dr. Henney on the basis the illegality of age discrimination was clearly established at the same time Dr. Henney allegedly discriminated against Ms. Migneault.

1243 (10th Cir. 1992).

We review district court orders denying qualified immunity on summary judgment *de novo*. *Romero v. Fay,* 45 F.3d 1472, 1475 (10th Cir. 1995). In our review of summary judgment rulings, the evidence in the record and inferences drawn therefrom, are viewed in the light most favorable to the nonmoving party. *Id.* However, we treat summary judgment rulings involving a qualified immunity defense somewhat differently than other summary judgment rulings. *Id.*

Our review of the district court's ruling denying qualified immunity on summary judgment consists of two inquiries directed toward the plaintiff. Once the defendant pleads qualified immunity, the burden shifts to the plaintiff to demonstrate (1) the defendant's conduct violated the law, and (2) the relevant law was clearly established when the alleged violation occurred. *Clanton v. Cooper,* 129 F.3d 1147, 1153 (10th Cir. 1997). "If the plaintiff fails to carry either part of his two-part burden, the defendant is entitled to qualified immunity." *Albright v. Rodriguez,* 51 F.3d 1531, 1535 (10th Cir. 1995). To show a fight is clearly established, Ms. Migneault must cite to Supreme Court or Tenth Circuit decisions on point, or to weight of authority from other courts defining the contours of the fight. *Foote v. Spiegel,* 118 F.3d 1416, 1424 (10th Cir. 1997). "The contours of the fight [the official is alleged to have violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that fight." *Anderson v. Creighton,* 483 U.S. 635,640 (1987.)

Dr. Henney argues Ms. Migneault failed her burden of identifying a clearly established fight. Specifically, Dr.

Henney claims Ms. Migneault failed to show the law is clearly established that a claim for age discrimination in employment is cognizable under the Equal Protection Clause, independent of the ADEA. We agree.

Neither the Supreme Court nor this court have squarely addressed whether an Equal Protection claim exists independent of an ADEA claim. Other courts have addressed the issue, however, and in doing so, have refused to recognize Equal Protection claims for age discrimination in employment. For numerous, well-founded reasons we need not repeat here, both the Fourth and Fifth Circuits have concluded that age discrimination claims brought under § 1983 are preempted by the ADEA. *See Lafieur v. Texas Dep't of Health,* 126 F.3d 758, 760 (5th Cir. 1997) (granting qualified immunity from Equal Protection claim for age discrimination because the ADEA provides the sole remedy for age discrimination claims by individuals); *Zombro v. Baltimore City Police Dep't,* 868 F.2d 1364, 1369 (4th Cir.), *cert. denied,* 493 U.S. 850 (1989) (holding the ADEA provides the exclusive judicial remedy for claims of age discrimination). Ms. Migneault cites no contrary authority. [8]

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[8] In support of her § 1983 claim, Ms. Migneault relies on two distinguishable cases - *Bankers Life & Cas. Co. v. Crenshaw,* 486 U.S. 71 (1988), and *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985). *Bankers Life* and *City of Cleburne* each address the constitutionality of certain state statutes under the Fourteenth Amendment Equal Protection Clause. *See Bankers Life,* 486 U.S. at 80-85 (denying equal protection challenge against Mississippi's "penalty statute," which requires unsuccessful appellants to pay an additional assessment of fifteen per cent of the

We therefore adopt the holding and rationale of *Lafieur v. Texas Dep't of Health* as the law of this circuit, and hold the clearly established law on this issue operates to defeat Ms. Migneault's § 1983 claim against Dr. Henney.

Accordingly, we **AFFIRM** the part of the district court's order denying Eleventh Amendment immunity to the University of New Mexico; we **REVERSE** the part of the district court's order denying qualified immunity to Dr. Henney and **REMAND** with instructions to dismiss Ms. Migneault's § 1983 claim against Dr. Henney for the reasons stated.

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judgment); *City of Cleburne*, 473 U.S. at 450 (invalidating on equal protection grounds a municipal zoning ordinance that required a special use permit for the operation of a group home for the mentally retarded). Neither case stands for the proposition that Ms. Migneault may bring a § 1983 claim grounded in the Equal Protection Clause where, as here, the ADEA provides a comprehensive statutory scheme to address her age discrimination claims.

APPENDIX B

JOANNE B. MIGNEAULT, Plaintiff,

v.

RICHARD PECK, et al., Defendants.

OPINION

CIV 96-385 JC/LFG

[Filed March 14, 1997]

MEMORANDUM OPINION

THIS MATTER came on for consideration of: (1) Defendants' Motion to Dismiss, filed June 13, 1996; (2) Defendants' Motion for Summary Judgment, filed December 2, 1996; and (3) Defendants' Motion to Strike Exhibit I to Plaintiff's Response to Defendants; Motion for Summary Judgment, filed December 20, 1996. The Court has reviewed the motions, the memoranda submitted by the parties and the relevant authorities. The Court finds that Defendants' Motion to Dismiss is well taken in part and will be **granted in part**. The Court further finds that Defendants' Motion for Summary Judgment is well taken in part and will be **granted in part**. Finally, the Court finds that Defendants' Motion to Strike Exhibit 1 to Plaintiff's Response to Defendants' Motion for Summary Judgment is not well taken and will be **denied**.

Background

Plaintiff was born on August 22, 1940 and was over 40 years old at all times relevant to this litigation. Plaintiff has also been married to Robert L. Migneault, the Dean of Library Sciences at UNM, at all relevant times.

Plaintiff was employed by the University of New Mexico from 1982 to December 31, 1994. For the majority of that time, she was a full-time, permanent employee, holding the position of Assistant to the Director of the Center for Non-Invasive Diagnosis (CNID). In March of 1994, Plaintiff was told by her supervisor that her position would be eliminated due to financial shortfalls. Plaintiff's lay-off was to go into effect on June 30, 1994. In fact, while Plaintiff's budgeted position was eliminated effective June 30, 1994, her supervisor secured funding from another source, and Plaintiff was maintained on the payroll through December 31, 1994.

On March 31, 1994, while still employed as the Assistant to the Director of CNID, Plaintiff applied for the position of Executive Secretary for the Office of the Vice President for Health Sciences. In Plaintiff's position at CNID, she was classified as a grade 11 and earned approximately $38,000 per year. The Executive Secretary position was classified as a grade 9, and the person chosen for that position was paid $27,500.

On May 12, 1994, Plaintiff was interviewed for the Executive Secretary position by Warren Baur, Associate Vice President for Finance and Administration in the Office of the UNM Vice President for Health Sciences. Plaintiff was selected as

a finalist for the position and was interviewed on May 16, 1994 by Defendant Henney. Plaintiff alleges that during the interview Defendant Henney asked if Plaintiff's husband was employed at UNM. Defendant Henney argues that it was Plaintiff who brought up her husband's work, and that Plaintiff's alleged comment during the interview, "I guess I can simply do secretarial work," indicated that Plaintiff would not be satisfied in a secretarial position. On June 24, 1994, Plaintiff wrote a letter to Defendant Ortiz asking him for an update on the Executive Secretary position. On July 19, 1994, Defendant Ortiz informed Plaintiff that Rose Johnson had been hired for the position and that Plaintiff was not offered the position because she was overqualified and because the feeling was that Plaintiff would not be happy. Ms. Rose was under the age of 40 when she was offered the position of Executive Secretary.

In March of 1995, Plaintiff was interviewed by Defendant McKinney for the position of Administrative Coordinator III. Plaintiff had not asked to be interviewed for the position, but was contacted at Defendant McKinney's suggestion. After interviewing candidates, Defendant McKinney offered the position to another individual who was also on the lay off roster. The person who received the job offer was over 40 years old but younger than Plaintiff.

On March 28, 1995, Plaintiff filed a charge of age discrimination with the EEOC pursuant to the ADEA.

Plaintiff filed this lawsuit on March 22, 1996 against the University of New Mexico; Richard Peck, President of UNM; David McKinney, Vice President for Business and Finance; Dr. Jane Henney, Vice President for Health Sciences; Dr.

Paul Roth, Dean of the School of Medicine; Romeo Ortiz, Director of Human Resources; and the members of the Board of Regents, in their official and individual capacities.

Plaintiff's Complaint contains five counts: (1) count I alleges that Defendants violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (ADEA) by not hiring Plaintiff for the positions of Executive Secretary and Administrative Coordinator III because of the age; (2) count II alleges that Defendants violated Plaintiff's First Amendment rights by refusing to consider her for an appropriate position at UNM because of her affiliation and support of CNID and because of her marriage to a Dean on the Main Campus; (3) count III alleges that Defendants violated the Equal Protection Clause of the Fourteenth Amendment by violating her First Amendment rights and the ADEA under color of state law; (4) Count IV alleges that Defendants violated Plaintiff's rights to procedural and substantive due process as guaranteed by the Fifth and Fourteenth Amendments; (5) Count V alleges that Defendants retaliated against Plaintiff for her filing of the EEOC charge by failing to return her from lay-off status.

Analysis

I. Defendants' Motion to Dismiss

A. Legal Standard

Generally, motions to dismiss for failure to state a claim are viewed with disfavor and are therefore rarely granted. 5 Wright and Miller, Federal Practice and Procedure § 1357 (1990). In ruling on a motion to dismiss, the Court must

construe the complaint in the light most favorable to the plaintiff and take the allegations asserted in the complaint as true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

The district court should not grant a motion to dismiss for failure to state a claim unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1947). Therefore, "the issue is not whether a plaintiff will ultimately prevail but whether claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A motion to dismiss is proper only if a plaintiff does not sufficiently plead a set of facts which would entitle him to relief. Smith v. Colorado Dep't. of Corrections, 23 F.3d 339,340 (10th Cir. 1994).

B. Discussion

(1) The University of New Mexico

The Eleventh Amendment prohibits suit in federal court against a state, a state department or agency, or a state official acting in his official capacity unless (1) the state has consented to suit, or (2) Congress has abrogated the state's Eleventh Amendment immunity. Pennhurst State Sch. & Hosp. V. Halderman, 465 U.S. 89, 101 (1984). In enacting 42 U.S.C. § 1983, Congress provided a federal forum and remedy for deprivations of federally-protected rights, but did not thereby

create any substantive rights or override a state's Eleventh Amendment immunity. See Quern v. Jordan, 440 U.S. 332 (1979). Thus, if the State can be said to be "the real, substantial party in interest" in a § 1983 action, the federal court may not entertain the claim unless the state has unequivocally consented to suit. See Pennhurst, 465 U.S. at 101. Furthermore, neither a state nor a state actor acting in his official capacity is a "person" subject to liability for monetary damages under 42 U.S.C. § 1983. Will v. Michigan Dept. Of State Police, 491 U.S. 58 (1989).

Therefore, the only cause of action which may apply against the University of New Mexico (UNM) is Count I, which alleges a violation of the ADEA. All other counts in the Complaint are brought under § 1983. As Plaintiff admits in her Complaint that UNM is an arm of the state, there is no question that her §1983 claims may not be brought against UNM. Therefore, all counts except Count I will be dismissed against the University of New Mexico.

Defendants argue that the ADEA claim should also be dismissed against UNM because the Supreme Court's recent decision in Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996) prevents this Court from exercising jurisdiction over Plaintiff's age discrimination claim. The Supreme Court in Seminole Tribe held that Congress can only abrogate a state's Eleventh Amendment immunity by (1) an unequivocally expressed intention to waive the immunity and (2) pursuant to a valid exercise of power under the fourteenth Amendment. Id. At 1123 and 1125. Defendants contend that Congress did not act according to a valid exercise of power when abrogating the states' Eleventh Amendment immunity under the ADEA because it promulgated the ADEA based on

Commerce Clause powers rather than the Fourteenth Amendment.

I have previously ruled that the Tenth Circuit has specifically found otherwise. Shriver v. Board of Regents of Univ. of N.M., Civil No. 95-0015 JC/RLP (filed July 11, 1995). In Hurd v. Pittsburgh State Univ., 29 F. 3d 564 (10th Cir.), *cert. denied,* 115 S.Ct. 321 (1994), a Tenth Circuit panel affirmed Judge Lungstrum's opinion in Hurd v. Pittsburgh State Univ., 821 F. Supp. 1410 (D. Kan. 1993), with little comment. Judge Lungstrum held that "[t]his court, however, concludes that the ADEA, as amended in 1974, was enacted pursuant to Congress' powers under section five of the Fourteenth Amendment." Hurd, 821 F. Supp. 1412. Therefore, under Seminole Tribe, Congress acted within its Constitutional powers when it abrogated the states' Eleventh Amendment immunity in the ADEA, and Defendants' Motion to Dismiss will be denied with respect to the ADEA claim against UNM.

(2) The Board of Regents

On September 9, 1996, an order was entered in this case dismissing the members of the Board of Regents as defendants. Plaintiff argues that the members of the Board of Regents were only dismissed in their individual capacity and remain as defendants in their official capacity. For the purpose of this motion, I will assume that Plaintiff is correct in that the September 9, 1996 order only dismissed the Board of Regents members in their individual capacity. Nevertheless, they must now be dismissed in their official capacity as well. The same rationale is applicable here as was used in analyzing the § 1983 claims against UNM. The Board

of Regents acting in its official capacity is an arm of the State of New Mexico. Therefore, a § 1983 action will not lie against the Board, and all § 1983 claims brought against the Board of Regents in their official capacity must be dismissed.

Plaintiff has conceded in her Response brief that Count I, alleging a violation of the ADA, is proper only against the University of New Mexico. Therefore, because there are no causes of action which are properly brought against the Board of Regents in their official capacity, the complaint will be dismissed against them in its entirety.

(3) Richard Peck

Dr. Peck is and has been the President of UNM all times relevant to this litigation\gation. Plaintiff's only allegation against Dr. Peck is that he is responsible for the implementation and enforcement of all University policies and that he refused to take any actions to remedy the wrong suffered by Plaintiff.

> There is no concept of strict supervisor liability under section 1983. [] In other words, it is not enough for a plaintiff merely to show a defendant was in charge of other state actors who actually committed the violation. Instead, just as with any individual defendant, the plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights. A Plaintiff may satisfy this standard by showing the defendant-superior personally directed the violation or had actual knowledge of the violation and acquiesced in its

continuance.

Jenkins v. Wood, 81 F.3d 988, 995 (10th Cir. 1996) (internal quotations and citations omitted).

Plaintiff's allegation against Defendant Peck, is, as a matter of law, insufficient to state a cause of action under § 1983. While Plaintiff alleges that Peck was aware of her situation, she has not alleged that he personally directed the actions of the other Defendants of which Plaintiff complains or that he acquiesced in their alleged violation of Plaintiff's rights. Therefore, all claims against Defendant Peck shall be dismissed.

(4) Dr. Paul Roth

Dr. Roth was the Interim Director of the Medical Center and Interim Dean of the School of Medicine. Plaintiff's only allegation against Dr. Roth is that he allowed the other Defendants to engage in unlawful practices and discriminate against Plaintiff due to their involvement in CNID. As with the allegations against Defendant Peck, this allegation is insufficient to state a claim under §1983. Plaintiff has not alleged that Defendant Roth personally directed the other defendants to engage in any illegal acts or that he acquiescend in their continuance. Therefore, all claims against Defendant Roth will be dismissed.

(5) Romeo Ortiz

Mr. Ortiz is the Associate Director of the Human Resources of the Health Sciences Center. Plaintiff's only allegation against Mr. Ortiz is that, by not enforcing University Policy

and Procedure, he allowed the other Defendants to refuse to hire Plaintiff for illegal reasons. Once again, this allegation is not sufficient to state a claim for which relief may be granted. Plaintiff is only accusing Defendant of having failed to stop other Defendants from violating Plaintiff's rights. This is a theory of respondeat superior and is unavailable under § 1983. Therefore, all claims against Defendant Ortiz will be dismissed.

(6) Dr. Jane Henney and Mr. David McKinney

Dr. Henney is the Vice-President for Health Sciences at UNM. Plaintiff alleges that Dr. Henney refused to hire her in violation of ADEA and University Policies and Procedures. Plaintiff further alleges that Dr. Henney refused to hire her because of Plaintiff's prior affiliation with CNID and because she was married to the Dean of Library Sciences on the Main Campus, all in violation of Plaintiff's First and Fifth Amendment rights.

Mr. McKinney is the Vice-President for Business and Finance at UNM. Plaintiff alleges that Mr. McKinney is directly responsible for administration and implementation of the UNM Business Policies and Procedures and that he denied Plaintiff a position under his direct supervision as Administrative Coordinator III to the Vice-President of Business and Finance while she was on lay-off status with the University.

(a) Count II - First Amendment

Plaintiff alleges that Defendants Henney and McKinney, by denying her the positions of Executive Secretary and

Administrative Coordinator III, violated Plaintiff's First Amendment right to free association. Plaintiff alleges that Defendants did not hire her due to her marriage to a Dean on the Main Campus and due to her support and affiliation with CNID. Plaintiff argues that both of these alleged reasons for not hiring her violated her First Amendment right to free association. However, her allegation that she was not hired due to her affiliation and support of CNID is better analyzed under the rubric of freedom of speech. Plaintiff is not alleging that she was not hired simply because of the fact that she worked at CNID, but rather because of her support of her former boss in the debate regarding the future of CNID.

Defendants acknowledge in their Memorandum in Support of Motion for Summary Judgment that the right to marriage is protected by the First Amendment right to association. See Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978). They argue, however, that Plaintiff's right to be married to a dean on main campus is not similarly protected by the First Amendment. For the purposes of the Motion to Dismiss, I will assume, without deciding, that Plaintiff is protected from discrimination based on her marriage by the First Amendment right to association. I will address the evidence of such discrimination in deciding Defendants' Motion for Summary Judgment.

With regard to Plaintiff's allegation that her First Amendment right of free speech was violated by Defendants Henney's and McKinney's refusal to hire her due to her former association and support of CNID, it is necessary to determine whether Plaintiff's speech was protected under the First Amendment. In order to be protected speech, speech must be regarding a matter of public concern and the interests of the employee in

making the statements must be weighed against the public employer's interest in the effective and efficient fulfillment of its responsibilities to the public. Melton v. City of Okla. City, 879 F.2d 706, 73 (10th Cir. 1989). Assuming that Plaintiff demonstrates that her speech was protected under the First Amendment, she must them show what her speech was a motivating factor in the detrimental employment decision taken against her. Mount Healthy City Sch. Dist. V. Doyle, 429 U.S. 274 (1977).

Looking at a motion to dismiss, and construing the Complaint in favor of Plaintiff, I am unable to say that Plaintiff has not stated a claim for the violation of her right of free speech. While her speech regarding the organization and future of CNID is unlikely to be considered in the public interest, I am unable to so determine at this time. I must examine evidence outside of the pleadings to make such a determination, and thus this analysis is better done under a motion for summary judgment. Likewise, Plaintiff's interests in making the statements may or may not be greater than UNM's interest in the effective and efficient fulfillment of its responsibilities to the public, but I am unable to make such a determination at this time. Finally, Plaintiff has adequately alleged that her speech was a motivating factor in Defendants Henney's and McKinney's refusal to hire her. Therefore, I will not dismiss Count II against Defendants Henney and McKinney.

(b) Count III - Equal Protection

Plaintiff alleges that her equal protection rights guaranteed by the Fourteenth Amendment were violated when Defendants violated her rights under the First Amendment and the ADEA. Defendants do not deny Plaintiff's claim that a

violation of her First Amendment rights violates the Equal Protection clause. Defendants do, however, argue that a violation of the ADEA cannot violate the Equal Protection clause because age is not a protected classification under the Fourteenth Amendment.

I found earlier in this opinion that the ADEA was enacted pursuant to Congress' power under the Fourteenth Amendment. It must logically follow, therefore, that age is a protected classification under that amendment. Were it not so, Congress would have been unable to enact the ADEA pursuant to the Fourteenth Amendment. The cases cited by Defendants in support of their argument state merely that age is not a "suspect" classification worthy of a heightened standard of review. City of Cleburne, Tex. V. Cleburne Living Ctr., 473 U.S. 432, 441 (1985); Vance v. Bradley, 440 U.S. 93, 97 (1979). They do not state that age is not protected under the Fourteenth Amendment. See id. As I find that age is a protected classification under the Fourteenth Amendment, and that Plaintiff's Complaint adequately alleges that Defendants Henney and McKinney discriminated against Plaintiff based on her age, I will not dismiss Count III against Defendants Henney and McKinney.

(c) Count IV - Due Process

Plaintiff alleges that both her procedural and substantive due process rights were violated. She claims that she had a property or liberty interest in UNM's written employment policies and procedures and that Defendants' alleged violation of those policies and procedures deprived her of property or liberty without due process of law. However, Plaintiff fails to point out any case law giving an individual a property or

liberty interest in a state agency's employment policies and procedures.

Due process rights attach only if the interest asserted rises to the level of a "property" or "liberty" interest and is more that just a unilateral expectation. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). Additionally, substantive due process rights are founded not on state provisions but on deeply rooted notions of fundamental personal interests derived from the Constitution. Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986). Under Tenth Circuit precedent, a government employee may have a property interest in her job entitling her to the protection of substantive due process. Archuleta v. Colorado Dep't of Insts., 936 F.2d 483, 489 n.6 (10th Cir. 1991). However, the Due Process clause "is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, 426 U.S. 341,350 (1976).

I find that Plaintiff seeks to use the Due Process clause as protection from an alleged incorrect personnel decision. Moreover, any rights granted to Plaintiff by UNM's personnel policies do not rise to the level of fundamental rights. Therefore, I will dismiss Count IV, alleging violations of Due Process, against Defendants Henney and McKinney.

(d) Count V - Retaliation

Plaintiff alleges that she was retaliated against for filing an EEOC complaint. Yet she has alleged no adverse employment action by either Defendant Henney or Defendant McKinney following the filing of the EEOC complaint. Her only allegations against Defendant Henney involve not being

selected for the Executive Secretary position. Plaintiff was informed in June of 1994 that she was not given the Executive Secretary position. Because she did not file her EEOC Complaint until March 28, 1995, there is no possibility that she was not hired for the position in retaliation for the EEOC Complaint. Likewise, Defendant McKinney informed Plaintiff that he had chosen someone else to fill the Administrative Coordinator III position on February 17, 1995, over one-month prior to her filing of the EEOC Complaint. Because Plaintiff has not alleged that Defendants Henney and McKinney took any adverse employment action against her subsequent to the filing of the EEOC Compliant, Plaintiff has not stated a cause of action upon which relief may be granted, and Count V will be dismissed against Defendants Henney and McKinney.

II. Defendants' Motion to Strike Exhibit 1 to Plaintiff's Response

Attached to her Response to Defendants' Motion for Summary Judgment, Plaintiff as included 101 exhibits. Exhibit 1 is an 81-page affidavit by Plaintiff herself. Defendants move the Court to strike this exhibit because they argue that it is not based on personal knowledge and thus is an improper affidavit under Fe. R. Civ. P. 56.

Defendants are correct in that much of the information contained in Plaintiff's affidavit is not based on personal knowledge and thus should not be included in her affidavit. A striking example of this is the statement on page 46 of her affidavit which reads:

> The entire matter of the hiring of Ms. Basler

> over me is riddled with unanswered questions, non-existing paperwork and procedural violations. The bottom line reason for this is because Mr. McKinney wrongfully refused to rehire me at UNM because I was/am the wife of a dean on campus and because Mr. McKinney did not want the wife of an academic dean privy to his [affairs].

This is clearly speculation on Plaintiff's part. She is presenting her opinion as to what happened, not her personal knowledge.

Despite the many portions of Plaintiff's affidavit which are improper, she does include information of which she has first hand knowledge. Because Plaintiff has included information in the affidavit of which she has first hand knowledge and which may be useful in deciding the Motion for Summary Judgment, I will deny Defendants' Motion to Strike Exhibit 1 of Plaintiff's Response. Nevertheless, Plaintiff and her counsel are strongly advised that, in the future, affidavits should be based solely on personal knowledge and should not include speculation or argument that belongs more properly in the brief submitted by counsel.

III. Defendants' Motion for Summary Judgment

A. Legal Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Federal Rules of Civil Procedure provide that it is the

movant's burden to demonstrate the absence of a genuine issue of material fact. See Celotex Corp. V. Catrett, 477 U.S. 317, 321-323 (1986). Once the movant has made such a showing, the adverse party "may not rest upon the mere allegations or denials of [their] pleading[s], [they] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In reviewing a summary judgment motion, "[t}he evidence must be viewed in the light most favorable to the nonmoving party, Frandsen v. Westinghouse Corp., 46 F.3d 975, 977 (10th Cir. 1995), even when it is produced by the moving party." Buchanan v. Sherrill, 51 F.3d 227, 228 (10th Cir. 1995). "Summary judgment is only appropriate if 'there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" Biester v. Midwest Health Servs., Inc., 77 F.3d 1264, 1266 (10th Cir. 1996) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). "Thus, to defeat a summary judgment motion, the non-movant 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" Id. (citing Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986)). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 at 249-250 (citations omitted).

B. Discussion

(1) University of New Mexico

The only remaining claim against UNM is that it violated the ADEA by not hiring Plaintiff for the positions of Executive Secretary and Administrative Coordinator III. Defendants

argue that this Court does not have jurisdiction over the ADEA claim because Plaintiff failed to file her EEOC Complaint in a timely manner.

I agree with Defendants that this Court does not have jurisdiction over Plaintiff's allegations that Defendant McKinney refused to hire her in violation of the ADEA. Plaintiff did not include that incident in her EEOC Complaint, and thus she cannot now bring it before this Court.

Plaintiff did, however, timely file her EEOC Complaint alleging that Defendant Henney did not hire her in violation of the ADEA. Defendants argue that Plaintiff did not file the EEOC Complaint within the 180-day time limit set out in 29 U.S.C. § 626(d)(1) because she was informed that Defendant Henney had hired another person for the Executive Secretary position on June 28, 1994, and she did not file her EEOC Complaint until March 28, 1995. Plaintiff responds that she did not learn that she had been discriminated against until February 14, 1995, and that therefore her EEOC Complaint was timely filed.

In their arguments, both Plaintiff and Defendants appear to ignore the provisions of 29 U.S.C. §§ 626 (d)(2) and 633(b) which provide that a plaintiff may file an EEOC Complaint within 300 days of the act of discrimination in a deferral state. A deferral state is one in which there is a law prohibiting discrimination based on age and which establishes or authorizes a state authority to grant or seek relief from such discriminatory practice. See 29 U.S.C. 633(b). New Mexico is clearly a deferral state as NMSA § 28-1-7(A) prohibits employers from discriminating based on age and NMSA § 28-1-3 creates the New Mexico Human Rights Commission

where parties can seek relief from age discrimination. Therefore, Plaintiff had 300 days in which to file her EEOC Complaint. As she filed her EEOC Complaint nine months after she was informed that she was not to receive the Executive Secretary position, she clearly met the 300 day filing deadline.

Plaintiff's first step in proving discrimination under ADEA is to supply evidence proving a prima facie case of age discrimination by a preponderance of the evidence. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, (1993). To prove a prima facie case of age discrimination, Plaintiff must show that: (1) she was a member of a protected class (age 40 to 70); (2) she was adversely affected by the employment decision; (3) she was qualified for the position; and (4) a younger person was given the desired position. Jones v. Unisys Corp., 54 F.3d 624, 630 (10th Cir. 1995). "An ADEA plaintiff must establish that age was 'a determining factor' in the employer's challenged decision." Id. (quoting E.E.O.C. v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988)). This burden may be met by means of direct or circumstantial evidence. Id.

Once Plaintiff establishes her prima facie case, a presumption arises that her employer unlawfully discriminated against her, and the burden shifts to Defendant to produce admissible evidence of a nondiscriminatory explanation for its employment action. St. Mary's Honor Center, 113 S. Ct. At 2747. If Defendant meets its burden, then Plaintiff bears the ultimate burden of showing that there is an issue of material fact whether the employer's nondiscriminatory reason is pretextual. Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995). "If the plaintiff succeeds in showing a prima

facie case and presents evidence that the defendant's proffered reason for the employment decision was pretextual--i.e., unworthy of belief, the plaintiff can withstand a summary judgment motion and is entitled to go to trial." Id.

Plaintiff easily makes out a prima facie case of age discrimination. First, at age 53, she was undoubtedly within the protected class. Second, she was denied the position of Executive Secretary in Defendant Henney's office, and she was, at least arguably, qualified for the position. Finally, Rose Johnson, who was given the position was, at age 31, outside the protected class.

The burden then shifts to Defendant UNM to articulate a non-discriminatory reason for failing to hire Plaintiff. As did Plaintiff, UNM is able to meet this burden easily. Defendant Henney articulated several legitimate reasons why she did not hire Plaintiff. It appeared from Plaintiffs resume that it had been a fairly long time since Plaintiff had done secretarial work. Furthermore, Defendant Henney was looking for a person who had contacts both within and outside of UNM and who had knowledge of UNM Boards. Defendant Henney believed that Rose Johnson better possessed these contacts and knowledge than did Plaintiff. Furthermore, Defendant Henney stated that Plaintiff's relatively important position at CNID and her alleged comment during the interview that she could "just do secretarial work," led Defendant Henney to believe that Plaintiff would not be happy in the position.

While the above reasons articulated by Defendant UNM for not hiring Plaintiff are sufficient to pass the burden of proof back to Plaintiff, Plaintiff is able to make a showing that these reasons are pretextual. First, Plaintiff states that she never

made the comment about doing "just secretarial work," and argues that she has at least as many, if not more contacts both within and outside UNM as did Rose Johnson. Plaintiff also argues that Defendant Henney, had she checked Plaintiff's references, would have found that Plaintiff had strong secretarial skills which she used frequently in her job at CNID. Finally, Plaintiff alleges that during her interview, Defendant Henney asked Plaintiff why she would want to retire in that position. Plaintiff understood this comment to be a negative reference to her age, and such an interpretation is not unreasonable. I find that Plaintiff has met her burden of showing that a material fact exists as to whether Defendant's proffered non-discriminatory reasons are pretextual. Therefore, the question of whether Defendant UNM violated Plaintiffs rights under the ADEA should go to a jury, and I will not grant summary judgment as to Count I.

(2) Dr. Jane Henney and Mr. David McKinney

The remaining claims against Defendants Henney and McKinney are that they violated Plaintiff's First Amendment rights and her Equal Protection rights.

(a) *Violation of the First Amendment*

Plaintiff claims that she was not employed by Defendants Henney and McKinney in violation of her rights to free speech and free association under the First Amendment. First, she claims that she did not receive offers of employment from Defendants due to her support of CNID. To determine whether Defendants possibly deprived Plaintiff of her First Amendment right of free speech, I must first decide whether Plaintiff's speech focused on a matter of public concern.

Walter v. Morton, 33 F.3d 1240, 1242 (10th Cir. 1994).

A statement is a matter of public concern if it can be "fairly considered as relating to any matter of political, social, or other concern to the community[,]" but if it is of a personal nature, then it is not protected. Connick v. Myers, 461 U.S. 138, 146 and 147 (1983). To decide whether a particular statement is of a personal nature, "courts must conduct a case by case inquiry, looking to the 'content, form, and context' of the speech, which includes scrutinizing whether the speaker's purpose was to bring an issue to the public's attention or to air a personal grievance." Moore v. City of Wynne Wood, No. 94-6164, slip op. At 15 (10th Cir. June 13, 1995). For an employee's speech to be protected, it must be helpful to the public in evaluating government conduct, and it cannot merely relate generally to matters of public interest. Id.

Plaintiff's allegedly protected speech was her complaints about the way in which CNID was to be reorganized. Plaintiff's comments were directed only to UNM employees and were, without doubt, in the nature of a private grievance. Plaintiff was not attempting to bring UNM's allegedly wrongful conduct to the public attention, but was rather informing UNM itself that she did not think its actions were proper. Plaintiff cannot credibly argue that her comments regarding CNID's reorganization were helpful to the public in evaluating government conduct. Therefore, I find that the First Amendment does not protect Plaintiff's statements made in support of CNID, and I will grant summary judgment for Defendants Henney and McKinney on the allegation that they violated Plaintiff's First Amendment rights to free speech.

Plaintiff next argues that she was not hired by Defendants

Henney and McKinney due to her marriage to a dean on main campus in violation of her First Amendment right to free association. Plaintiff has not produced sufficient evidence that her marriage was a determining factor in any employment decision to create a material issue of fact. Plaintiff's only evidence against Defendant McKinney in this regard is that he knew of her marriage. This is clearly insufficient. Against Defendant Henney, Plaintiff's only evidence that she was not employed due to her marriage is the allegation that Defendant Henney asked her during her interview if her husband worked on main campus. Defendant Henney asserts that Plaintiff was the one who brought up her marriage, but this is irrelevant. Even if Defendant Henney had asked the alleged question, it would be, as a matter of law, insufficient to show a violation of Plaintiff's right to free association. Therefore, I will grant summary judgement as to Plaintiff's claims that Defendants violated her First Amendment right to free association.

(b) *Equal Protection*

The essence of Plaintiff's Equal Protection claim is that Defendants Henney and McKinney violated her Fourteenth Amendment right to Equal Protection by not hiring her in violation of the ADEA and her First Amendment rights. As discussed above, there is insufficient evidence to create a material fact as to whether her First Amendment rights were violated. Therefore, those allegations are likewise unable to support a violation of Equal Protection and will be dismissed. As for Plaintiff's claim that the alleged violation of the ADEA violated Plaintiff's rights under the Equal Protection clause, I will examine each remaining Defendant separately.

(i) Defendant Henney

I found above that there was sufficient evidence to support a claim that UNM violated the ADEA when Defendant Henney refused to hire Plaintiff. The difference between the ADEA claim and the Equal Protection claim is that the ADEA claim is against UNM where the Equal Protection claim is against Defendant Henney personally. Nevertheless, the conduct that underlies the claims is the same. As I already found that there was sufficient evidence to go to a jury based on Defendant Henney's actions, I need not reanalyze that issue here. Plaintiff has produced sufficient evidence that Defendant Henney's actions violated the ADEA and thus violated Plaintiff's Equal Protection rights. Therefore, I will not grant summary judgment on the Equal Protection claim against Defendant Henney based on her alleged age discrimination against Plaintiff.

(ii) Defendant McKinney

Whereas I had already analyzed Plaintiff's allegations of age discrimination against Defendant Henney, the same is not true regarding the allegations against Defendant McKinney. Plaintiff alleges that Defendant McKinney discriminated against her based on her age in violation of her Equal Protection rights. The same analysis must be used here as was used in analyzing the ADEA claim against UNM. Plaintiff must first make out a prima facie case of discrimination. The burden then shifts to Defendant McKinney to articulate non-discriminatory reasons for not hiring Plaintiff. If Defendant does this, the burden shifts back to Plaintiff, and she must produce evidence that Defendant's reasons are pretextural.

Plaintiff is able to make out a prima facie case of age

discrimination. She was 54 years old at the time that she was not hired. She was adversely affected by not being hired even though she was at least arguably qualified for the job, and the job was given to a younger individual. Even though the person who received the job was also a member of the protected class, she was considerably younger than Plaintiff. Defendant McKinney is likewise able to meet his burden of articulating non-discriminatory reasons for not hiring Plaintiff. Defendant states that he was looking for someone with strong computer skills for the job and that the other candidate had better computer skills. Thus, Defendant meets his burden, and Plaintiff now has the burden to produce evidence that Defendant McKinney's reasons are pretextual. The only evidence that Plaintiff has produced is that, according to her, computer skills were not a large part of the job description and were not really necessary for the job. I find that this is insufficient to allow a reasonable jury to disbelieve Defendant's articulated reasons for not hiring Plaintiff. Therefore, I will grant summary judgment on Plaintiff's claim that Defendant McKinney violated her Equal Protection rights.

(3) *Qualified Immunity*

Defendants argue that qualified immunity bars Plaintiff's claims against them. The only claim remaining against an individual defendant is that Defendant Henney violated Plaintiff's Equal Protection rights. Therefore, I will address the question of qualified immunity only in that context.

In evaluating a claim of qualified immunity, the Court must first determine whether Plaintiff asserted a violation of a constitutional right. Liebson v. New Mexico Corrections

Dep't., 73 F.3d 274, 276 (10th Cir. 1996). "If the court determines that plaintiff has asserted the violation of a constitutional right, the court must then determine whether that right was clearly established so that reasonable officials in defendants' situation would have understood their conduct violated that right." Id.

Here, I have already determined that Plaintiff has stated a violation of a constitutional right. She has asserted a violation of her right to Equal Protection under the Fourteenth Amendment. The alleged violation occurred when Defendant Henney discriminated against Plaintiff based on her age. There can be no question but the illegality of age discrimination was clearly established at the time that Defendant Henney is alleged to have discriminated against Plaintiff. Furthermore, the Tenth Circuit had already ruled that the ADEA was promulgated under Congress' Fourteenth Amendment powers. Therefore, I find that the law was sufficiently established so that reasonable officials would have understood that age discrimination violates a person's Equal Protection rights. For this reason, Defendant Henney is not entitled to qualified immunity for the alleged violation of Plaintiff's Fourteenth Amendment right to Equal Protection.

III. Conclusion

Following the above analysis of Defendants' Motion to Dismiss and Motion for Summary Judgment, the only claims remaining in this case are: (1) that Defendant UNM violated the ADEA when Defendant Henney refused to employ Plaintiff as an Executive Secretary due to age discrimination; and (2) that Defendant Henney violated Plaintiff's right to Equal Protection under the Fourteenth Amendment when she

refused to employ Plaintiff due to age discrimination.

An order in accordance with this opinion shall be entered.

/s/_____
CHIEF UNITED STATES DISTRICT JUDGE

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APPENDIX C

STATUTES INVOLVED

Sections 626(b) and (c) of the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. § 621, et *seq.)* provide as follows:

§ 626. Recordkeeping, investigation, and enforcement

> **(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion**

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling

employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Sections 630(b) and (f) of the ADEA provide as follows §

630. Definitions.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United

States employed by an employer in a workplace in a foreign country.

Section 216(b) of the Fair Labor Standards Act of 1938 provides:

§ 216. Penalties.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff

to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.